IN THE

Supreme Court of the United States

October Term, 1976

76-1148

RAY MARSHALL, Secretary of Labor, et al.,
Appellants,

vs.

BARLOW'S, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF AMICI CURIAE ON BEHALF OF ELEVEN STATES URGING REVERSAL

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QUESTION PRESENTED

Whether the inspection provisions of section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), which authorize representatives of the Secretary of Labor to conduct limited inspections of commercial premises at reasonable times without a warrant, are consistent with the Fourth Amendment.

INTEREST OF AMICI CURIAE

Pursuant to specific congressional encouragement[1] twenty-three states[2] and the Virgin Islands have state development plans on file with the Secretary of Labor which entitle these states and the Virgin Islands to supplant federal enforcement of the Occupational Safety and Health Act after the completion of several development steps. Thus, enforcement of the Occupational Safety and Health Act within these states is now predominately accomplished by the respective state officials.

If the decision in *Barlow's, Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1977) (three-judge court), is allowed to stand, the efforts of these states to protect their workers against occupational hazards will be severely impaired since the states would no longer be able to make the unannounced reasonable warrantless inspections of commercial establishments which Congress determined were critical to a proper enforcement of the Occupational Safety and Health Act.[3]

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[1] The enabling legislation reads in relevant part as follows:

> (b) Any state which at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b).

[2] The twenty-three states are Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

[3] *See* H.R. Rep. No. 91-1291, 91st Cong. 2d Sess. 27 (1970).

ARGUMENT

By enacting the Occupational Safety and Health Act, (hereinafter "the Act"), 29 U.S.C. § 651 *et seq.*, Congress was attempting to meet the national crisis of occupational hazards involving safety and health in the workplace. Section 8(a)[4] of the Act provides to the Secretary of Labor and his authorized representatives a limited right to enter commercial premises without a warrant to conduct inspections. This circumscribed right of warrantless entry is unquestionably a reasonable search for purposes of the Fourth Amendment and is fully consistent with relevant decisions of this Court. By ruling section 8(a) to be violative of the Fourth Amendment, the district court herein, *Barlow's, Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1977), misconstrued decisions of this Court concerning warrantless administrative inspections and other types of warrantless inspections and declined to consider several directly relevant district court decisions. Furthermore, the right to privacy embodied in the Fourth Amendment was never intended to be used as a device to deny workers their right to work in a safe environment.

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[4] Section 8(a) reads as follows:

> (a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

I. CONGRESS FOUND THE OCCUPATIONAL HAZARDS EXISTING IN THE WORKPLACE TO BE A NATIONAL CRISIS.

In considering the Act, Congress faced the stark fact that over 14,500 American workers die each year as a result of their jobs and that approximately 2.2 million more workers are disabled on the job.[5] Congress further found that "this grim current scene . . . represents a worsening trend, for the fact is that the number of disabling injuries per million man hours worked is today 20% higher than in 1958."[6]

This Court, in the recent case of *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm.*, 97 S. Ct. 1261, 1263 (1977) discussed this congressional history and observed that "[a]fter extensive investigation, Congress concluded, in 1970, that work-related deaths and injuries had become a 'drastic' national problem." Quoting the Senate Report, the Court further observed that

> The problem of assuring safe and healthful workplaces for our working men and women ranks in importance with any that engages the national attention today . . . . In addition to the individual human tragedies involved, the economic impact of industrial deaths and disability is staggering. Over $1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over $8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses.

[5] S. Rep. No. 91-1282, 91st Cong., 2d Sess. 2 (1970).
[6] *Id.*

Id. at 1263 n. 1. *See also National Realty and Construction Co., Inc. v. Occupational Safety and Health Review Comm.*, 489 F.2d 1257, 1260-61 (D.C. Cir. 1973).

The congressional history reflects a public interest in the demonstrable problem of health and safety in the workplace that is at least as substantial as the interest in liquor control recognized by this court in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) and the interest in firearms control recognized by this court in *United States v. Biswell*, 406 U.S. 311 (1972). As one district court, which upheld a provision in the Food, Drug, and Cosmetic Act, 21 U.S.C. § 374 allowing warrantless inspections of warehouses containing food products, observed:

> It would be an affront to common sense to say that the public interest is not as deeply involved in the regulation of the food industry as it is in the liquor and firearms industries.[7]

II. SECTION 8(a) IS CONSISTENT WITH THE ADMINISTRATIVE INSPECTION CASES OF THIS COURT.

The Fourth Amendment does not ban all warrantless searches but only those which are unreasonable. *See Camara v. Municipal Court*, 387 U.S. 523, 533 (1967). In defining what is a reasonable search, a strong presumption of validity attaches to a congressional determination of reasonableness. *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Di Re*, 332 U.S. 581 (1948). Furthermore, "[i]n delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual. . . ." *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

[7] United States v. Business Builders, Inc., 354 F. Supp. 141, 143 (D. Okla. 1973).

In the most recent pronouncement on administrative inspections, *United States v. Biswell*, 406 U.S. 311 (1972), this Court upheld a warrantless search of the commercial premises of a licensed firearms dealer against contentions that the search violated the Fourth Amendment. At issue in this case was a provision of the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*, which authorized warrantless inspections by Federal Treasury agents of firearms or ammunition dealers. Pursuant to this authority, the respondent Biswell's premises were inspected by federal agents and, based on evidence found during this inspection, Biswell was convicted of a firearms violation. In upholding the conviction, this Court held that:

> In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.

Id. at 315. In elaborating on its rationale for this holding, the *Biswell* Court focused on two critical points which have precise parallels in the instant case.

First, this Court noted that "close scrutiny of [firearms] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders." *Id.* at 315. Thus, it is clear that the *Biswell* Court, in weighing the public interest, was concerned with the demonstrable problems in firearms trafficking and the necessity of meeting the problem with an effective law. Similarly, the scope of the problems in occupational safety and health have been noted *supra* and are as relevant to this Court's determination herein as they were in *Biswell*.

Second, in *Biswell*, this Court emphasized the critical importance of unannounced inspections by stating:

> It is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment. . . . Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.

Id. at 316.

Similarly, it is clear that unannounced inspections are critical to the efficacy of the Act in the case at bar. Congress recognized that many occupational hazards are transitory or easily concealed[8] and that unannounced inspections were necessary, since "advance notice to an employer has been a prime cause of the breakdown in . . . enforcement" under other safety statutes.[9] Furthermore, the constant possibility of inspections is essential to secure the broad voluntary compliance on which the effectuation of the Act depends.[10]

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[8] Examples of the transitory nature of many occupational hazards are outlined in considerable detail in the Secretary's Jurisdictional Statement in the instant case at 10 n. 12.

[9] H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 27 (1970). The Act makes it a criminal offense to give advance notice of an inspection. 29 U.S.C. § 666(f). Furthermore, this Court has noted that "surprise may often be a crucial aspect of routine inspections of business establishments. . . ." See v. City of Seattle, 387 U.S. 541, 545 n. 6 (1967).

[10] *See* Usery v. Godfrey Brake & Supply Serv., Inc., 545 F. 2d 52, 55 (8th Cir. 1976); Dunlap v. Rockwell International, 540 F.2d 1283, 1292 (6th Cir. 1976).

Any contention that the *Biswell* principles apply only to historically regulated industries must fail for the Court, in referring to *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970),[11] explicitly observed that "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry [in Colonnade]." 406 U.S. at 315. Nevertheless, the Court in *Biswell* proceeded to validate the warrantless search of a firearms dealer.[12]

Furthermore, there is nothing in *Camara v. Municipal Court*, 387 U.S. 523 (1967) or *See v. City of Seattle*, 387 U.S. 541 (1967) which would militate against this Court applying the *Biswell* rationale to the instant case. *Camara* involved a warrantless administrative search of an occupied part of an apartment house. The housing codes were enforced by criminal processes and it was a criminal violation for an occupant to deny admittance to housing inspectors. The Court ruled that under such circumstances and where the occupant had "no way of knowing the lawful limits of the inspector's power to search," *Camara v. Municipal Court, supra*, 387 U.S. at 532, such warrantless searches contravened the Fourth Amend-

[11] In Colonnade, this Court held that the Secretary of the Treasury had authority under congressional enactments to enter the premises of retail liquor dealers and conduct inspections without a warrant.

[12] In any event, the safety of the workplace and health of the workers was pervasively regulated prior to the Act. As the Senate Report stated:

> There is a long-established statutory precedent in both Federal and State law to require employers to provide a safe and healthful place of employment. Over 36 states have provisions of this type, and at least three Federal laws contain similar clauses, ...

S. Rep. No. 91-1282, 91st Cong., 2d Sess. 150 (1970), 1970 U.S. Code Cong. & Admin. News, 5177, 5186. *See also*, 29 U.S.C. § 653(b)(2); Associated Industries of New York State v. United States, 487 F.2d 342, 351-53 (2d Cir. 1973).

ment. Similar issues were presented in *See* except that the administrative search therein involved commercial premises.

The rationales of *Camara* and *See* are inapplicable to the instant case for several reasons. First, both *Camara* and *See* involved criminal prosecutions. The *Camara* court repeatedly noted this factor, 387 U.S. at 531-33, and emphasized that "only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search." 387 U.S. at 532. Similarly, a criminal statute was involved in *See v. City of Seattle* and that case adopted the principles enunciated in *Camara*. 387 U.S. at 542.

Section 8(a), however, is a civil law and imposes virtually no threat of criminal liability.[13] Furthermore, there are no sanctions whatsoever for refusals to allow inspections and, upon a refusal, the Department of Labor must commence civil enforcement proceedings. 29 C.F.R. §1903.4.

Second, *Camara* only held that "unreasonable" administrative inspections of private dwellings were prohibited by the Fourth Amendment. One of the specific rationales articulated for ruling the search therein to be unreasonable was that the occupant of a dwelling had

> no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization.

Camara v. Municipal Court, 387 U.S. at 532.

Under section 8(a), however, the parameters of the warrantless inspection are carefully circumscribed. Section 8(a)

[13] Section 17(e) authorizes criminal sanctions only where there are willful violations causing employee death. 29 U.S.C. § 666(e).

provides that a representative of the Secretary of Labor may enter a place of employment "without delay and at reasonable times . . . to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, ..." 29 U.S.C. 657(a). The inspection must be limited to the scope necessary to identify occupational hazards. *Id.* When an inspector presents himself at a place of employment, he must show the employer appropriate credentials,[14] and if the employer is unconvinced, he may call the OSHA Area Director for verification. *See Usery v. Godfrey Brake & Supply Service, Inc.*, 545 F.2d 52, 55 (8th Cir. 1976). The inspector must explain the nature, purpose and scope of the inspection, 29 C.F.R. § 1903.7(a), and the employer may accompany the inspector during his inspection, 29 U.S.C. § 657(e). Furthermore, the inspection must not unreasonably disrupt normal business operations, 29 C.F.R. § 1903.7(d), and at the conclusion of the inspection, the inspector must informally advise the employer of any apparent safety or health violations. 29 C.F.R. § 1903.7(e).

Thus, section 8(a) substantially ameliorates the problems the *Camara* court expressed with the broad scope of the search involved in that case. Furthermore, although the *See* Court recognized that the businessman was free from "unreasonable official entries" the Court differentiated the standard of reasonableness to be applied for commercial premises vis-a-vis private homes:

[14] These credentials "state the inspector's name, identify him as a compliance officer for the Department of Labor and paraphrase the statutory authority for his entry. The officer's photo and signature appear on the credentials." Usery v. Godfrey Brake & Supply Service, Inc., 545 F.2d 52, 54 (8th Cir. 1976).

> We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes. . . ."

387 U.S. at 545. *See G.M. Leasing Corp. v. United States*, 97 S. Ct. 619, 629 (1977); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 204-05 (1946); *Youghiogheny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 50-51 (E.D. Ohio 1973).[15]

Finally, in *Camara*, the Court noted that "[i]t has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement." *Camara v. Municipal Court, supra*, 387 U.S. at 533.

In the instant case, however, Congress indicated its intent that entry be made "without delay" within the limits of section 8(a) and specifically observed that advance notice to employers had impeded the effective implementation of other safety statutes.[16] A warrant requirement would significantly impair the effectiveness of authorized inspections since, as this Court has noted, "surprise may often be a crucial aspect of routine inspections of business establishments." *See v. City of Seattle, supra*, 387 U.S. at 545, n. 6. *See Brennan v. Buckeye*

[15] In Youghiogheny, a case involving the power of the Secretary of the Interior to make warrantless searches of coal mines, the court emphasized the quasi-public nature of the mines by observing that:

> the plaintiff's mines are open to representatives of the public and the public has every right to ensure that the working conditions of these same mines meet certain safety standards. It might be said that the plaintiff waives any rights to privacy it may otherwise have in these facilities by operating a business which requires the daily labor of large numbers of miners who have understandably been characterized by Congress as the 'most precious resource of the coal industry.'

364 F. Supp. at 50-51.

[16] *See* H.R. Rep. No. 91-1291, 91st Cong. 2d Sess. 27 (1970).

Industries, Inc., 374 F. Supp. 1350, 1354 (S.D. Ga. 1974). In addition, the Act covers several million workplaces and the Secretary of Labor has only about 1,300 inspectors. A requirement of routine pre-inspection warrants would unduly hamper the effective administration of the Act by placing a significant burden on these limited resources thus impairing the effectuation of the Act's purpose of swift abatement of occupational hazards.

Furthermore, since the Act's purposes are best effectuated by random unannounced spot inspections, the factors identified in *Camara* as supporting a finding of probable cause[17] would not normally exist for an inspection pursuant to section 8(a). In most instances, until the inspection has taken place, there is no way of knowing whether possible violations of the Act exist which threaten a worker's safety. As this Court observed in *United States v. Biswell, supra*, 406 U.S. at 316, "if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible."

In summary, the rationale delineated by this Court in *Biswell* for validating limited warrantless administrative searches of commercial premises should be applied to the case herein. There are no significant distinguishing factors between the provision of the Gun Control Act upheld in *Biswell* and section 8(a) of the Act. Furthermore, such a determination would not be inconsistent with *Camara* and *See* and, indeed, would comport with the underlying principle of *See* that a reasonable inspection of a business establishment may be conducted without a warrant.

[17] The factors outlined in Camara included "passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area. . . ." Camara v. Municipal Court, *supra*, 387 U.S. at 538.

III. THE DISTRICT COURT'S RELIANCE ON ALMEIDA-SANCHEZ AND WESTERN ALFALFA IS MISPLACED.

In addition to its reliance on *Camara* and *See*, the district court determined that this Court's decisions in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) and *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), mandated an invalidation of section 8(a). However, *Almeida-Sanchez* involved a substantially different fact situation and, in any event, the rationale of that decision has been undermined by this Court's more recent decision in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The *Western Alfalfa* case is, to the extent relevant, supportive of the Secretary's position.

In *Almeida-Sanchez*, this Court ruled that a warrantless search of an accused's private automobile made without probable cause or consent by a roving patrol of the United States Border Patrol about 25 miles north of the Mexican border was not a border search and was not justified by the Immigration and Nationality Act.[18] and violated the Fourth Amendment's warrant requirement. Although the district court herein did not elaborate on its rationale for relying on *Almeida-Sanchez*, it is apparent that the search in *Almeida-Sanchez* was of a virtually unlimited and standardless nature. It was fraught with possibilities of abuse, invasions of privacy and unbridled discretion of the Border Patrol and bears no resemblance to section 8(a) of the Act.

[18] The Immigration and Nationality Act, 8 U.S.C. § 1357(a)(3) allowed such warrantless searches "within a reasonable distance from any external boundary of the United States."

In the more recent case of *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), which the district court did not cite, this Court upheld routine stops and checks at a fixed point 66 miles north of the Mexican border. In language particularly significant to the instant case, this court stated that:

> In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual. . . .

Furthermore, the Court emphasized varying degrees of expectations of privacy and emphasized that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." Similarly, a businessman's privacy expectations are necessarily less than in one's residence since by its "special nature and voluntary existence [a business] may open itself to intrusions that would not be permissible in a purely private context." *G.M. Leasing Corp. v. United States*, 97 S. Ct. 619, 629 (1977). *See Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 204 (1946). *Youghiogheny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 50-51 (E. D. Ohio 1973). It was never intended that the Fourth Amendment cast a veil of protective secrecy over commercial ventures which might subject their employees to potentially hazardous working conditions.

The district court herein also relied on this Court's recent determination in *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974) and viewed it as a specific reaffirmation of *Camara* and *See*. Such reliance by the district court was totally misplaced. *Western Alfalfa* applied the "open fields" exception of the Fourth Amendment to the situation

where an inspector for the petitioner entered the outdoor premises of a commercial establishment without the knowledge or consent of the respondent to observe smoke plumes emitted from chimneys. Indeed, if any conclusion is to be drawn from this case, it would seemingly suggest a further narrowing of the Fourth Amendment warrant requirement vis-a-vis inspections of commercial establishments in line with *Colonnade and Biswell*.[19]

In summary, *Almedia-Sanchez* and *Western Alfalfa Corp.* lend no support to appellants' position and the recent case of *Martinez-Fuerte* emphasizes the flexible approach this Court has taken relative to Fourth Amendment warrant issues depending on circumstances other than private homes.

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[19] Furthermore, the District Court did not discuss United States v. Del Campo Baking Mfg. Co., 345 F. Supp. 137 (D. Del. 1972), a case much closer to the facts in the case at bar than a border search case. The federal court there upheld a warrantless, nonconsensual inspection of a bakery by Food and Drug Administration inspectors. The warrantless inspection was authorized by 21 U.S.C. § 374(a) and the court noted that it was carefully limited.

CONCLUSION

The efficacy of the enforcement efforts of the Secretary of Labor and of the various states which administer their own OSHA program would be severely impaired if any type of a warrant requirement were mandated by this Court. Unannounced, random inspections are crucial to obtaining the broad voluntary compliance which is required for a proper effectuation of the Act. Section 8(a) is a reasonable approach to confronting the national crisis in occupational health and safety existing in this country.

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